

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 205554

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SEP 28 1994

In the Matter of)
)
Amendment of Part 74 of the)
Commission's Rules With Regard)
to the Instructional Television)
Fixed Service)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 93-24

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REPLY COMMENTS OF UNITED STATES WIRELESS CABLE, INC.

United States Wireless Cable, Inc. ("USWC"), through counsel and pursuant to the Commission's Order and Further Notice of Proposed Rulemaking (the "NPRM"), hereby replies to the Comments of the Wireless Cable Association International, Inc. (the "Association"), and in support hereof respectfully shows as follows:

I. Commenter's Interest

USWC is the parent company of United States Wireless Systems, Inc., the operator of wireless cable systems serving Lubbock, Brownsville and Victoria, Texas and constructing systems in several other markets. USWC also is a stockholder in Heartland Wireless Communications, Inc., the successor operator of several markets initially developed by USWC.

USWC generally is supportive of the efforts of the Commission and the Association to speed the introduction of wireless cable service. However, USWC must take issue with the suggestion of the Association that the Commission should under some circumstances link ITFS application qualifications with

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commercial MMDS license or lease rights. Specifically, the Association proposed in Section E of its Comments that the Commission may wish to adopt a cap on ITFS filings with an exception that would apply, "when a wireless cable operator that already has access to four or more MDS channels in the market is completing its channel complement." Association Comments at iv and 22-24.

II. MDS Channel Rights Should Not Be A Qualification Requirement For ITFS Applications

USWC opposes any rule change that would favor existing MDS channel licensees. USWC has found many such licensees to be speculative filers from the 1983 MDS application window. Few if any of these lottery winners are interested in constructing and operating wireless cable systems in competition with wired cable. Rather, the MDS lottery winners generally have sought to sell or lease their channels to wireless cable companies like USWC for the highest price they can obtain.

While Congress subsequently has passed legislation to require that MDS channels be auctioned, many MDS channels already have been awarded to 1983 lottery winners. To make leasing or owning such channels a qualification requirement for filing an ITFS application would serve to enhance the bargaining position of the MDS lottery winners at the expense of educators and wireless cable operators.

USWC takes exception to the premise of the Association that educational entities have somehow been disadvantaged or exploited by the current ITFS Rules. On the contrary, the ITFS

rules have accomplished their objective to bring educational institutions into the communications license process in partnership with wireless cable companies, to promote and enhance distance learning and educational programming, and to generate channel lease revenues for schools, colleges and universities. Schools, colleges and universities have become stakeholders in wireless cable systems as they have never been in wired cable. This unique aspect of wireless cable is one of the Commission's most important contributions to the U.S. educational system, job training and enhanced U.S. worker competitiveness¹.

A rule change that would make control of MDS channels a qualification requirement for an ITFS filer also could undermine the ITFS rules designed to encourage local schools and colleges to apply since those controlling the commercial MDS channels could choose to contract with non-local, non-accredited ITFS filers. Non-local, non-accredited ITFS filers generally result in the diversion of ITFS lease revenues from local educators and taxpayers. The Commission should take extreme care that ITFS rule changes do not disadvantage local educators and taxpayers vis-a-vis non-local, unaccredited alleged "non-profit" entities.

Requiring MDS channel rights as a pre-condition to an ITFS application treats ITFS as an auxiliary service to MDS. While ITFS currently is classified in the Part 74 auxiliary and

¹/ Vocational colleges consistently have been interested in contracting with USWC to establish ITFS systems to reach potential students at job training sites.

experimental service rules, the Commission should not treat ITFS as auxiliary to MDS. This would tend to undermine the unique role of local, accredited educational institutions in wireless cable.

III. The Commission Should Take Steps To Stop The Warehousing Of MDS Channels

While the ITFS Rules are the stated subject of this NPRM, the stated purpose of this proceeding is to speed the introduction of wireless cable as a competing multi-channel video provider. USWC urges that the Commission take care not to divert its attention to fine tuning of ITFS rules that already are working well, while ignoring the far more serious and intractable problems that have resulted from the 1983 MDS filings.

In the view of USWC, the single most important rule change that the Commission could adopt to speed the introduction of wireless cable service and thereby generate enhanced competition to wired cable would be to amend its MDS rules, including Sections 21.44(a)(3) and 21.303(d), to stop the warehousing of MDS channels.

Section 21.44(a)(3) of the Commission's Rules has been and continues to be widely interpreted to permit MDS stations to remain off the air indefinitely so long as the station allegedly is capable of transmitting. Specifically, the term "operational" is being interpreted to mean capable of transmitting rather than actually transmitting.

It is difficult or impossible for any petitioner to prove that an MDS station is not capable of transmitting. Proof

that the station is dark is rebuffed under the widespread rule interpretation with the allegation that the station, though dark, is capable of transmitting and therefore is operational, although not operating.

The protested interpretation of Section 21.44(a)(3) has led to a lax attitude toward the construction of MDS facilities. Such facilities may be constructed, tested and shut down. They then remain off the air indefinitely, with the petitioner being unable to access a locked transmitter room to determine if equipment is still on site. Allegations that MDS equipment is removed after testing are difficult to prove since the petitioner generally has no right to enter the transmitter property.

The result of the contested interpretation of Section 21.44(a)(3) is a widespread, long term warehousing of MDS channels. This is directly contrary to the Congressional policy of developing effective competition to wired cable and of auctioning off unused MDS spectrum.

Section 21.303(d) of the Rules provides that if an MDS station remains dormant and does not serve the public for a year, the license is forfeited. But USWC is unaware of a single instance in which this rule has been applied, despite the prolonged dormancy of many alleged MDS stations.

Such long term warehousing has not been tolerated in the radio and television services under Part 73 of the Rules. Radio and television stations that are off the air for more than 30 days are required to file for an STA to remain dark under Part

73, Section 73.1735(a)(4) and are subject to continued reporting and license cancellation for failure to return to the air.

USWC is not aware of any widespread practice of constructing ITFS stations that are then left dormant for indefinite periods of time as has occurred and is occurring in the MDS service.² On the contrary, ITFS stations once constructed generally are operated in continuous service to the public under ITFS lease arrangements with wireless cable operators. ITFS leases generally are entered into prior to licensing and are filed with the application for a license. Thus, the Commission generally knows when it awards an ITFS license that the ITFS channels will be used for wireless cable service. MDS leases, on the other hand, are not required to be filed with the Commission.

While the Commission adopted what it thought was a strict one year construction deadline for MDS in Part 21, Sections 21.43 and 21.44(a)(1), the protested MDS rules have undermined this. Once a certification of construction is filed by an MDS conditional licensee, the MDS channel(s) can be warehoused while the licensee holds out for the most lucrative deal from a wireless cable operator and while the public remains

^{2/} Under Part 74, Section 74.14, ITFS licensees are required to advise the Commission when construction is completed and program tests are commenced. While Section 74.963 does not require a regular schedule of operation, Section 74.931 requires that ITFS stations be licensed for a permissible purpose that includes minimum programming requirements.

unserved by a dark but allegedly "operational" facility that may or may not exist inside a locked transmitter room.

The reasons for the protested interpretation of the MDS rules and the practice of warehousing MDS spectrum are private and do not serve the public interest. MDS licensees are simply warehousing spectrum, holding out for the best possible deal from wireless cable operators offering to lease their channels and seeking to play off competing wireless cable operators against each other. MDS licensees believe they are under no time pressure to do otherwise since under their interpretation of the MDS Rules they can remain dark indefinitely and without Commission sanction so long as their facilities allegedly are "operational."

This warehousing of MDS spectrum disserves the public interest and is contrary to Commission and Congressional policy. Rather than making ITFS applicants hostage to MDS speculators, as the Association suggests, the Commission should amend its MDS rules to stop the warehousing of MDS channels.

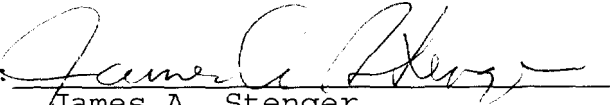
IV. Conclusion

USWC supports the efforts of the Commission and the Association to speed the implementation of wireless cable service to more communities. USWC urges the Commission not to undermine

the unique role of local educational institutions and to encourage MDS licensees to put their channels into service.

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CERTIFICATE OF SERVICE

I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 28th day of September, 1994, served by first-class mail, postage pre-paid, a copy of the foregoing "Reply Comments of United States Wireless Cable, Inc." to:

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